

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

11 ALI FARAJ,

12 Plaintiff,

13 v.

14 6TH AND ISLAND INVESTMENTS
15 LLC, a California limited liability
16 company, d.b.a. OMNIA
17 NIGHTCLUB SAN DIEGO, et al.,

Defendants.

Case No.: 16-cv-00181

**ORDER GRANTING
PLAINTIFF'S MOTION FOR
LEAVE TO FILE AMENDED
COMPLAINT**

(ECF No. 16)

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19 Plaintiff has filed a motion for leave to file an amended complaint (the
20 "Motion for Leave to Amend").¹ For the reasons below, Plaintiff's Motion for
21 Leave to Amend is GRANTED.

22 I. Procedural Background

23 On January 25, 2016, Plaintiff filed this action against defendants 6th and
24 Island Investments LLC, d.b.a. Omnia Nightclub San Diego ("6th and Island

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27 ¹ Plaintiff also requested modification of the May 13, 2016 scheduling order, but
28 withdrew the request because it was mooted by Magistrate Judge Burkhardt's
subsequent entry of an amended scheduling order on July 7, 2016.

1 LLC"), and Hakkasan LA LLC (collectively, "Defendants"). Plaintiff alleges that
 2 Defendants' employee or agent denied him entry into the Omnia nightclub
 3 because he is blind. He states claims against Defendants for violation of Title III
 4 of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12181, et
 5 seq., the Unruh Civil Rights Act, California Civil Code §§ 51 et seq., common law
 6 negligence, negligence per se, negligent supervision, and intentional infliction of
 7 emotional distress, and seeks damages, declaratory and injunctive relief.

8 On March 16, 2016, Defendants filed an answer to the complaint, along
 9 with a corporate disclosure statement stating that 6th and Island Investments
 10 LLC, d.b.a. Omnia Nightclub San Diego, is wholly owned by Hakkasan Fabric-
 11 Stingaree Holdings, LLC, a Nevada limited liability company ("Hakkasan Fabric-
 12 Stingaree").

13 On June 20, 2016, Plaintiff filed this Motion for Leave to Amend the
 14 complaint to (1) add Hakkasan Fabric-Stingaree as a defendant, and (2) add
 15 factual allegations describing occasions on which he was deterred from
 16 patronizing defendants' facility as a result of the initial incident of alleged
 17 discrimination.

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19 II. Discussion

20 Following the short period of time when pleadings may be amended "as a
 21 matter of course," thereafter "a party may amend its pleading only with the
 22 opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2).
 23 Courts "should freely give leave when justice so requires," Fed. R. Civ. P.
 24 15(a)(2), and they must apply the policy favoring amendment "with extreme
 25 liberality." Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th
 26 Cir. 1990). Courts apply the same policy of liberality in granting leave to amend
 27 "whether the amendment will add causes of action or parties." DCD Programs
 28 Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987); Fed. R. Civ. P. 21 ("the court

1 may at any time, on just terms, add or drop a party"). Factors that may support
2 denial of leave to amend include bad faith, undue delay, prejudice to the
3 opposing party, and futility of amendment. DCD Programs Ltd., 833 F.2d at 185;
4 Foman v. Davis, 371 U.S. 178, 182 (1962). However, "[u]ndue delay by itself...
5 is insufficient to justify a motion to amend." Bowles v. Reade, 198 F.3d 752, 758
6 (9th Cir. 1999).

7 Defendants' opposition appears to be based on the position that leave to
8 amend should be denied as futile. Defendants argue, without any supporting
9 evidence, that Plaintiff was actually excluded from the Omnia nightclub for
10 reasons unrelated to his disability. In Defendants' words, "[o]n our facts, if
11 Plaintiff is denied leave to amend his complaint as requested, he will not be
12 injured." Defs.' Opp. at 3. Essentially, Defendants ask the Court to deny leave to
13 amend because, based on their version of the events, Plaintiff's case has no
14 merit.

15 Even if the Court could accept the arguments of Defendants' counsel as
16 evidence, which it cannot, whether the evidence supports Plaintiff's claims is
17 irrelevant to the futility of granting him leave to amend. "[A] proposed
18 amendment is futile only if no set of facts can be proved under the amendment to
19 the pleadings that would constitute a valid and sufficient claim or defense." Miller
20 v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988) (finding the district court
21 abused its discretion when it denied leave to amend an answer, based on the
22 position that the proposed amendment was not supported by evidence). The
23 standard for futility of amendment is the same as the one used to evaluate a
24 motion to dismiss under Federal Rule of Civil Procedure 12(b)(6): whether the
25 new allegations, taken as true, fail to state a claim on which relief can be granted.
26 See id. The only pertinent consideration is the legal sufficiency of the new
27 allegations, not whether they are factually disputed. Id. Here, Defendants'
28 argument is entirely premised on their disagreement over the factual basis for

1 Plaintiff's claims, which is not a basis for denying leave to amend.

2 The Court finds that contrary to Defendants' argument, Plaintiff's proposed
 3 amendments are not futile, and leave to amend should be granted. Plaintiff
 4 seeks to add Hakkasan Fabric-Stingaree as a defendant based on its alleged
 5 ownership of 6th and Island Investments LLC, d.b.a. Omnia Nightclub San Diego,
 6 which operated the nightclub in question. Pl.'s Proposed Am. Compl. ¶¶ 9, 11.
 7 As the alleged owner, Hakkasan Fabric-Stingaree is a party covered by Title III of
 8 the ADA. See 42 U.S.C. § 12182(a) (prohibiting discrimination of the basis of
 9 disability by any "person who owns, leases (or leases to), or operates a place of
 10 public accommodation"). The proposed addition of Hakkasan Fabric-Stingaree
 11 as a defendant is not futile. Moreover, because this Court's original jurisdiction is
 12 based on the existence of a federal question, not diversity of citizenship, adding
 13 Hakkasan Fabric-Stingaree does not create jurisdictional concerns.

14 Plaintiff also requests leave to amend to add factual allegations describing
 15 six occasions when he was deterred from patronizing defendants' facility as the
 16 result of the initial incident when he was denied entry.² Pl.'s Proposed Am.
 17 Compl. ¶¶ 22, 23. Among other claims, Plaintiff's original complaint includes a
 18 claim for declaratory and injunctive relief under the Title III of the ADA. Pl.'s
 19 Compl. ¶ 30. "Injunctive relief is available to 'any person who is being subjected
 20 to discrimination on the basis of disability' or who has 'reasonable grounds for
 21 believing that such person is about to be subjected to discrimination.'" Pickern v.
 22 Holiday Quality Foods Inc., 293 F.3d 1133, 1136 (9th Cir. 2002), quoting 42
 23 U.S.C. § 12188(a)(1). "[U]nder the ADA, once a plaintiff has actually become

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 26 ² Plaintiff's proposed amended complaint also includes two additional, minor
 27 changes that add descriptive facts without changing the substance of the
 28 allegations. Pl.'s Proposed Am. Compl. ¶¶ 15, 24. Defendants' opposition does
 not address these proposed amendments, and the Court finds no basis for
 denying Plaintiff leave to add them.

1 aware of discriminatory conditions existing at a public accommodation, and is
2 thereby deterred from visiting or patronizing that accommodation, the plaintiff has
3 suffered an injury.” Pickern, 293 F.3d at 1136-37; accord Chapman v. Pier 1
4 Imports (U.S.), Inc., 631 F.3d 939, 949 (9th Cir. 2011) (“A disabled individual ...
5 suffers a cognizable injury if he is deterred from visiting a noncompliant public
6 accommodation because he has encountered barriers related to his disability
7 there”).

8 In Pickern, the Ninth Circuit found that the following allegations supported
9 plaintiff’s claim for injunctive relief under the ADA: that “he is currently aware of
10 barriers to access that now exist at the Paradise store,” “that these barriers
11 currently deter him,” and “that the barriers deterred him from entering the store
12 just before filing suit even though he needed something from the store and was
13 in the parking lot.” Pickern, 293 F.3d at 1137. Plaintiff’s proposed amendments
14 here are similar to the ones approved of in Pickern, in that they describe specific
15 occasions when Plaintiff alleges he wanted to visit Defendants’ nightclub, but
16 was deterred from doing so because he was initially denied entry because of his
17 disability. In light of Pickern, Plaintiff’s proposed amendments are not futile.

18 The Court does not find that any other factors support denial of leave to
19 amend. There is no indication of prejudice or bad faith. With regard to undue
20 delay, Plaintiff’s motion was filed by the magistrate judge’s deadline for filing
21 motions to amend pleadings or add parties, and the Court does not find that
22 Plaintiff’s delay was excessive. In any event, “[u]ndue delay by itself... is
23 insufficient to justify a motion to amend.” Bowles, 198 F.3d at 758.

24 Therefore, Plaintiff’s Motion for Leave to Amend will be granted.

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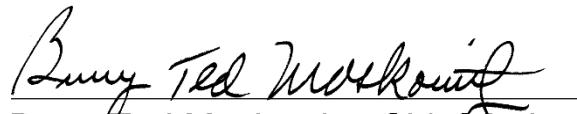
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1 III. Conclusion and Order

2 For the foregoing reasons, Plaintiff's Motion for Leave to Amend is
3 GRANTED. Plaintiff shall file the amended complaint on or before October 7,
4 2016.

5 **IT IS SO ORDERED:**

6 Dated: September 23, 2016

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8 Barry Ted Moskowitz, Chief Judge
9 United States District Court

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